BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KERRY CHRISTENSEN	)	
Claimant	)	
V.	)	
	)	
BUD'S TIRE SERVICE, INC.	)	Docket No. 1,066,073
Respondent	)	
AND	)	
	)	
FEDERATED MUTUAL INS. CO.	)	
Insurance Carrier	)	

ORDER

Respondent and insurance carrier (respondent) request review of Administrative Law Judge Rebecca Sanders' February 27, 2014 preliminary hearing Order. Jeff K. Cooper of Topeka, Kansas, appeared for claimant. M. Joan Klosterman of Kansas City, Missouri, appeared for respondent.

The record on appeal is the same as that considered by the administrative law judge and consists of the September 19, 2013 deposition transcript of claimant, the February 3, 2014 deposition transcript of Paul Stein, M.D., the February 25, 2014 preliminary hearing transcript and exhibits thereto, and all pleadings contained in the administrative file.

ISSUES

Claimant filed an application for hearing alleging repetitive trauma from lifting and maneuvering heavy items such as farm implement tires. The judge ruled claimant's date of accident was August 16, 2013, and his work activities were the prevailing factor in causing his injury and need for medical treatment. Respondent was ordered to provide medical treatment with Christian Lothes, M.D., and pay temporary total disability benefits from August 19, 2013, until claimant has been offered accommodated work, has reached maximum medical improvement, or upon further order.

Respondent requests the preliminary hearing Order be reversed, arguing claimant failed to prove injury by repetitive trauma arising out of and in the course of his employment, including failure to prove his work activities were the prevailing factor in causing his injury and need for medical treatment. Claimant maintains the Order should be affirmed.

The issue for the Board's review is: Did claimant sustain an injury by repetitive trauma arising out of and in the course of his employment, including whether the prevailing factor in his injury and need for medical treatment was his repetitive work?

FINDINGS OF FACT

Claimant is 59 years-old and has worked as repondent's farm service manager for over 40 years. His job requires a lot of forceful pushing and turning to repair and replace tractor, loader, combine and truck tires that weigh anywhere from 100 to 800 pounds.

Over the years, claimant would experience low back pain for which he would seek chiropractic treatment with R. R. Hafner, D.C. Dr. Hafner's records show claimant obtained sporadic treatment for various body parts, including for his low back, dating back to the late-1970s. From 2004 forward, claimant gave Dr. Hafner several reasons for his back pain, such as scooping dirt, slipping on ice, a wet boat dock or on mud, rolling logs, loading feed off a truck, cutting firewood, picking up limbs, stepping in a stump hole and tripping over a dog, a fence and a tree branch. Claimant testified he provided explanations for his injuries so his chiropractic bills would be paid under AFLAC. Despite all these explanations for his back pain, claimant testified he always believed it was his repetitive job causing his back problems and that he never hurt his back away from work. Claimant indicated that following chiropractic treatment, he would improve and continue his regular duties.

Claimant's primary care physician, David Bollig, M.D., noted in a November 22, 2011 report that claimant should consider work in which he would not need to stress his back and joints with changing heavy tires. A February 4, 2012 entry in Dr. Hafner's records stated that claimant strained his back moving lots of tires to a new location.

Claimant testified that he began experiencing increasing low back pain in September 2012 from moving large tires and twisting. Ben Wallace, one of respondent's owners, testified he noticed claimant was not walking very well and he could tell claimant was in pain in September 2012. He asked claimant what had happened. Claimant replied he was "cutting fire wood, had a chain saw in his hand, went to duck under a limb. And when he came up, the top of the limb hit him in the head and he felt something pop in his back."[1] Claimant acknowledged telling Mr. Wallace he had hit his head on a tree. Such event would have been outside of work.

Another chiropractor, Bradley A. Pyle, D.C., noted that a "small tree branch came down and hit" claimant in the head on September 11, 2012.[2] Dr. Pyle diagnosed a cervical sprain and a thoracic subluxation. Also, Dr. Pyle's September 19, 2012 report noted claimant had low back pain that came on while he was walking that day, while the chiropractor's September 25, 2012 report stated claimant complained of continuing aggravation of his back while putting on tires. When treatment failed to improve his symptoms, Dr. Pyle referred claimant to Dr. Bollig.

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[1] P.H. Trans. at 32.

[2] P.H. Trans., Resp. Ex. B (Sep. 12, 2012 Pyle Chiropractic report).

On October 24, 2012, claimant was seen by Dr. Bollig for pain in his right lower back and right hip area. The history provided was that he "was working around tree branch slipped and came in contact with it roughly nearly falling, worsening his back and hip area. He has chronic complaints involving his neck, back shoulders, low back. He works at Bud's Tire and his work is physically very demanding."[3] Dr. Bollig diagnosed claimant with osteoarthritis. Dr. Bollig gave claimant two cortisone injections and recommended he rest the area for two weeks. The injections failed to provide relief.

Claimant next sought treatment with James McAtee, M.D. On November 8, 2012, claimant was seen by Lindsay Pierce, PA-C, a physician assistant for Dr. McAtee. Claimant reported onset of low back pain on September 12, 2012 after he "hit head & shoulder on tree branch."[4] Claimant was diagnosed with lumbar degenerative disc disease and grade 2 to 3 spondylolisthesis, L5 on S1. An MRI of the lumbar spine was ordered. It was conducted on November 8, 2012, revealing advanced degenerative disc disease with severe spinal stenosis at L4-5, mild stenosis at L2-3 and L3-4, and bilateral pars defects involving L5 with grade 1 spondylolisthesis.

On November 21, 2012, Dr. McAtee reviewed claimant's MRI and recommended epidural steroid injections. Claimant had such injections that November and December.

Claimant followed up with Dr. McAtee on January 9, 2013, indicating the epidural injections had stopped the pain going down his leg, but he had pain going to both buttocks which woke him up at night. Dr. McAtee recommended physical therapy.

Dr. Bollig examined claimant on January 23, 2013. Dr. Bollig again noted claimant was advised to consider a less demanding job to help preserve his back and joints.

Claimant returned to Ms. Pierce on March 13, 2013. He denied much improvement and complained of a pinching sensation in his low back and into his buttocks. Ms. Pierce noted "most of [claimant's] pain is present first thing in the morning, with lifting heavy tires at work, and with repetative [sic] use when changing tires at work."[5] Ms. Pierce noted claimant's "work is extremely physically demanding and puts a lot [sic] of strain on his back. The possibility of him changes [sic] jobs or working in a less physically demanding position was discussed with him.[6]" Ms. Pierce recommended referral to a spine specialist.

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[3] P.H. Trans., Resp. Ex. B at 13.

[4] P.H. Trans., Resp. Ex. B at 379.

[5] P.H. Trans., Cl. Ex. 4 at 16.

[6] P.H. Trans., Cl. Ex. 4 at 18. Peter T. Hodges, M.D., also signed this report.

On March 13, 2013, claimant was also seen by Dr. Bollig for follow-up. Dr. Bollig diagnosed claimant with osteoarthritis and stated, "[t]he demanding nature of his work has caused/is causing a great deal of his orthopedic problems."[7]

On April 5, 2013, claimant was seen by Christian Lothes, M.D., a spine specialist. Claimant reported onset of symptoms in September 2012, and complained of severe low back pain radiating down his legs. Dr. Lothes stated claimant's "low back and leg symptoms are related to his lumbar spondylolisthesis, advanced disc degeneration and severe stenosis."[8] Dr. Lothes recommended an L4-S1 lumbar interbody fusion.

While Mr. Wallace was aware claimant had been having back problems for quite a few years, it was not until April 2013 that he was made aware it was work related. Mr. Wallace completed an "Employer Report of Injury/Illness" on April 9, 2013. It stated:

> On 9-10-12 Kerry came to work and couldn't hardly walk. I ask him what he had done to his self over the weekend. Because he was fine when he left work on 9-8-12. He said it wasn't done at work. I said told him then if it was it needed to be reported. He told me later that he had hit his head on a tree limp [sic] while cutting fire wood. Started see a chiropractor after but never stopped working.[9]

Mr. Wallace agreed claimant's job could be very physical at times and required heavy lifting, maneuvering of heavy tires and awkward positions. Mr. Wallace testified claimant was a trustworthy and "good employee" who "always got the job done."[10]

C. Reiff Brown, M.D., evaluated claimant at his attorney's request on August 6, 2013. Dr. Brown recommended surgical decompression of the stenotic area and probable spinal fusion. Dr. Brown stated:

> In my opinion, this man has multi-level spinal stenosis but this is most severe at the L3-L4 and L4-L5 levels. In my opinion the repetitive nature of his injury is demonstrated by his history and diagnostic as well as clinical tests. His employment did expose him to an increased risk which he would not have been exposed in non-employment life. The increased risk which his employment exposed him to is the prevailing factor causing his repetitive trauma (spinal stenosis). The repetitive trauma is the prevailing factor causing his present medical condition and his need for additional treatment.[11]

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[7] P.H. Trans., Resp. Ex. B at 8.

[8] P.H. Trans., Cl. Ex. 4 at 11.

[9] P.H. Trans., Resp. Ex. A.

[10] P.H. Trans. at 36.

[11] P.H. Trans., Cl. Ex. 3 at 5.

Claimant was seen by Dr. Bollig for a preoperative assessment on August 14, 2013. Dr. Bollig indicated claimant "continues to battle work related disease of his lumbar spine" and suffers from chronic pain "[r]elated to multiple areas of repetitive motion from work related activities/demands."[12] Dr. Bollig noted claimant's work was "extremely physical and has caused repetitive work related injury to his body."[13]

Claimant last worked August 17, 2013. Dr. Lothes performed lumbar fusion surgery on August 19, 2013. Dr. Lothes released claimant on December 26, 2013.

On September 9, 2013, Dr. Brown prepared an additional report after reviewing some of claimant's medical records, but not his chiropractic records. Dr. Brown stated:

> There [sic] repetitive nature of the injury has been demonstrated by diagnostic studies and physical examination of several doctors. The employment exposed [claimant] to an increased risk which he would not have been exposed to in non-employment life. The increased risk is the prevailing factor in causing the repetitive trauma. The repetitive trauma is the prevailing factor causing his present medical condition, and his impairment.[14]

On October 1, 2013, claimant was seen at his attorney's request by Paul Stein, M.D. Dr. Stein noted claimant had surgery due to: (1) degenerative arthritis and severe spinal stenosis at L4-L5 and (2) at least grade 1 spondylolisthesis at L5-S1 with L5 spondylosis. In addressing causation and prevailing factor, Dr. Stein stated:

> Neither of these pathologies was caused by his work activity. However, the type of activity that he did over a very extended period of time more likely than not resulted in progressive degeneration and escalation of the pathology. The activity as described is a considerably greater long-term stress on the lower back then [sic] would be expected with normal day to day activities and are particularly related to a specific type of employment. While I cannot state that [claimant] would not have had symptomatology absent his work activity, it is my opinion, based upon medical judgment, that the greatest factor in the current symptomatology and need for treatment is the work activity. On that basis, I believe that the work activity over time is the prevailing factor in the current symptomatology and need for treatment, including surgery. In making that decision I also take into account the fact that there are two separate pathologies, either or both of which would be accelerated by this work activity.[15]

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[12] P.H. Trans., Resp. Ex. B at 5-6.

[13] P.H. Trans., Resp. Ex. B at 5.

[14] P.H. Trans., Cl. Ex. 3 at 2.

[15] P.H. Trans., Cl. Ex. 2 at 7.

Dr. Stein only had claimant's medical and chiropractic records from March 2, 2011 forward. Dr. Stein was unaware of any clinical test that would show the nature of claimant's injury was due to repetitive trauma. He agreed claimant's spondylolisthesis and spondylosis were what caused claimant's symptoms. Dr. Stein also testified that claimant's 41 years of heavy and repetitive work resulted in the opinions contained in his report.

On February 3, 2014, claimant was seen at respondent's request by Lowry Jones, M.D. Dr. Jones noted claimant's job was quite stressful and required significant lifting. He diagnosed claimant with grade 3 spondylolisthesis, severe spinal stenosis and multilevel degenerative disc disease. Dr. Jones noted the "prevailing factor for his grade 3 spondylolisthesis" was congenital and claimant's need for surgery was due to spondylolisthesis which led to the severe spinal stenosis.[16] He noted claimant's work was the prevailing cause of his degenerative disc disease, but claimant's surgery was not due to degenerative disc disease. Dr. Jones further observed claimant's job aggravated his degenerative disc disease and underlying spondylolisthesis. Dr. Jones stated:

> I believe the prevailing cause for the diagnosis of spondylolisthesis, and advanced spinal stenosis is a congenital defect rather than a work related injury. His work did aggravate his symptoms but is not the prevailing cause (greater than 51%) for the diagnosis and his subsequent treatment.[17]

Judge Sanders issued a February 27, 2014 Order. She noted some facts were troubling, such as claimant's reluctance to tell his employers or his doctors that his back condition was work related, but such fact did not defeat compensability. The preliminary hearing Order stated:

> Claimant performed lifting, turning and manipulating of large tires that weigh 100 lbs upwards to 800 lbs. as a full time job.
>
> Claimant was able to do that job for forty years with congenital defects and degenerative conditions in his low back with intermittent chiropractic treatment.
>
> This Court respects all three doctors who rendered opinions in this case. However, this Court agrees with Dr. Stein and Dr. Brown that Claimant's work activities was the prevailing factor for the repetitive trauma in Claimant's back and the need for medical treatment.[18]

Respondent filed a timely appeal.

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[16] P.H. Trans., Resp. Ex. B at 2.

[17] P.H. Trans., Resp. Ex. B at 3.

[18] ALJ Order at 9-10.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508 states, in part:

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

. . .

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(I) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

> (h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

ANALYSIS

This Board Member agrees with the judge that there are bothersome factual aspects of the case. Claimant repeatedly told chiropractors and medical professionals that he injured his back due to various accidents or activities, few of which were work related. That being said, claimant would also sometimes implicate his job duties as causing or contributing to his back injury.

This Board Member agrees with the judge that claimant's repetitive work over many decades was the prevailing factor in his low back injury and need for medical treatment.

Respondent asserts Dr. Stein's statement and testimony that claimant's two different pathologies were not caused by his work activity bars compensation. This Board Member disagrees. Dr. Stein opined claimant's work activity resulted in progressive degeneration, worsening and acceleration of claimant's pathologies and was the prevailing factor in claimant's symptomatology and need for treatment. Simply put, claimant's repetitive work was the prevailing factor in his injury and need for medical treatment. Neither Dr. Stein, nor any other witness, indicated claimant's injury was a sole aggravation, acceleration or exacerbation of a preexisting condition.

As an aside, this Board Member reminds counsel that only relevant medical records need be placed into evidence.[19] Duplicative records[20] and records regarding unrelated personal health conditions, unrelated workers compensation claims and unrelated personal injuries are not pertinent.

CONCLUSIONS

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member concludes claimant sustained personal injury by repetitive trauma and his repetitive work was the prevailing factor in causing his injury and need for medical treatment. Claimant's injury was not a sole aggravation of a preexisting condition.

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[19] See *Gibson v. Honeywell Aerospace Electronics*, No. 1,033,149, 2007 WL 3348543 (Kan. WCAB Oct. 25, 2007), and *Reynoso v. The Boeing Co.*, No. 1,010,930, 2003 WL 22150551 (Kan. WCAB Aug. 28, 2003).

[20] For example, various reports from Orthopaedic & Sports Medicine Center are included in the exhibits as many as five times.

WHEREFORE, the undersigned Board Member affirms the February 27, 2014 preliminary hearing Order.[21]

IT IS SO ORDERED.

Dated this _____ day of April 2014.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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M. Joan Klosterman
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Honorable Rebecca Sanders

[21] By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.